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In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE MICHEL

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS KRIEGER

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION

The Attorney General on behalf of the United States prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Second Circuit entered in the above-entitled cases on January 14, 1930, reversing the judgments of the District Court of the United States for the Southern District of New York.

STATEMENT

The facts in these two cases are substantially the same. Respondents, who were partners doing business under the firm name of Michel & Krieger, brought actions in the District Court for the Southern District of New York to recover income taxes for the year 1919, alleging that the partnership income had been incorrectly determined because of overvaluation of closing inventory. (Michel, R. 1–6; Krieger, R. 1–6.) In each case action was instituted more than five years after the taxes were paid and more than two years after the disallowance of claim for refund, but less than two years after notification of the taxpayer that the claim had been officially rejected.

In the *Michel case* the complaint alleged (R. 2): The taxpayer filed an income-tax return for the calendar year 1919 on March 15, 1920, and paid the tax shown to be due thereon in four instalments on March 15, June 15, September 15, and December 15, of that year; a claim for refund of a portion of said tax was filed on February 7, 1924; the taxpayer was notified by the Commissioner of Internal Revenue by letter dated August 17, 1925, that the claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him; and under date of June 27, 1928, the Commissioner notified the taxpayer that the claim had been rejected on September 2, 1925. Action in the District Court to recover the tax was begun subsequent to the verification of the complaint on September 26, 1928. (R. 6.)

In the *Krieger case* the complaint alleged (R. 2): The taxpayer's return for 1919 was filed on March 15, 1920, and that the tax shown to be due thereon was paid in four instalments on March 15, June 15, September 15, and December 15, 1920; claim for refund was filed September 15, 1924; on April 2, 1925, the taxpayer was advised by the Commissioner that the claim would be rejected and the rejection would appear on the next schedule to be approved by him; and, under date of June 27, 1928, the taxpayer was notified that his claim for refund had been rejected on April 20, 1925. Action in the District Court was begun subsequent to the verification of the complaint on September 26, 1928. (R. 6.)

The District Court in each case granted a motion to dismiss on the ground that the complaint did not state facts sufficient to constitute a cause of action and entered judgment dismissing the complaint. (Michel, R. 7–10; Krieger, R. 7–11.) The court rendered no opinion.

On appeal the Circuit Court of Appeals reversed the judgments of the District Court, holding, by a divided court, that, although the actions were brought more than five years after the taxes were paid and more than two years after disallowance of the claims for refund, the statute of limitations had not run as the actions were instituted within two years after notification that the claims had been rejected.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that actions to recover taxes, begun more than five years

after payment and more than two years after the disallowance of claims for refund, were not barred by Section 3226 of the Revised Statutes as amended.

REASONS FOR GRANTING THE WRITS

The decision of the Circuit Court of Appeals in the instant cases is far-reaching in effect since it opens the way for litigation in a great number of cases which the Treasury had considered closed. Prior to September 1, 1928, it was the custom of the Treasury Department to notify taxpayers of the Commissioner's determination with respect to claims for refund a short time prior to the official rejection thereof, but no additional notice was given taxpayers after the approval of the official schedule of rejections. Under the decision of the court below the statute of limitations as to suits has not commenced to run in cases where the claims were rejected pursuant to this practice. We are advised by the Bureau of Internal Revenue that there are thousands of these claims which amount in the aggregate to more than two billions of dollars.

The decision is important from an administrative standpoint, since the reopening of claims by the Bureau is dependent upon whether the statute of limitations has run against suits to recover taxes. Where, as here, a notice was mailed more than 90 days after the rejection there is uncertainty under this decision whether the claim may be reconsidered by the Treasury.

The statute involved is ambiguous and the decisions of the courts are not in harmony as to its construc-

tion. The instant cases therefore present an important question of Federal tax law, which, we submit, should be authoritatively determined by this Court.

Wherefore it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Second Circuit should be granted.

WILLIAM D. MITCHELL,
Attorney General.

APRIL, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (Michel, R. 17–21; Krieger, R. 17–21) is reported in 37 F. (2d) 38

JURISDICTION

The judgments of the Circuit Court of Appeals were entered January 14, 1930. (Michel, R. 21; Krieger, R. 21.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the Commissioner of Internal Revenue does not notify a taxpayer within ninety days after the official rejection of a claim for refund, is an action, brought more than five years after payment of the tax and more than two years after the disallowance of the claim for refund, barred under the provisions of Section 3226 of the Revised Statutes as amended

and reenacted in Section 1113 of the Revenue Act of 1926?

STATUTE AND REGULATIONS INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156), provides in part as follows:

> SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such

disallowance notify the taxpayer thereof by mail."

The pertinent provisions of Treasury Regulations 69 promulgated under the Revenue Act of 1926 are as follows:

> ART. 1351. *Suits for recovery of taxes erroneously collected.*—Under the provisions of section 3226 of the Revised Statutes, as amended by the Revenue Act of 1924 and reenacted without change by section 1113 of the Revenue Act of 1926, no suit or proceeding by any person for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, can be maintained in any court until a claim for refund or credit has been duly filed with the Commissioner (see section 284 and articles 1301–1306) and six months have elapsed from the date of filing such claim, unless the Commissioner renders a decision within six months, in which case suit may be brought upon the rendition of the decision. No suit or proceeding in court can be brought after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The statute requires that the Commissioner shall notify the claimant by mail of the disallowance of the claim for refund or credit

within 90 days after such disallowance. Payment of the tax, penalty, or other sum under protest or duress is not a prerequisite to the bringing of such suit or proceeding.

Section 3226 of the Revised Statutes, as amended, outlines the only manner in which a suit may be brought by any person for the recovery of taxes erroneously or illegally assessed or collected or penalties collected without authority, or any sums excessive or in any manner erroneously collected, and strict compliance with these provisions by any person bringing such suit or proceeding is required.

STATEMENT

A statement of the facts and of the error relied on is contained in the petition.

ARGUMENT

The express terms of Section 3226 of the Revised Statutes as amended by Section 2 of the Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, and reenacted without change by Section 1014 of the Revenue Act of 1924 and by Section 1113 of the Revenue Act of 1926, require that a taxpayer to recover taxes alleged to have been erroneously or illegally collected must begin his action within five years after payment of the taxes or within two years after the disallowance of the claim for refund. In the instant cases neither of the respondents brought his action within five years after payment of the taxes or within two years after the disallowance of his claim for refund by the Commissioner of Internal Revenue. Respondents con-

tended, and the Circuit Court of Appeals held, that although their actions were not commenced within the five-year period or the two-year period, the statute of limitations had not run as the actions were instituted within two years after notice that the refund claims had been officially disallowed.

We submit that the Circuit Court of Appeals has applied an interpretation to the statute which is contrary to its express language. The disallowance of a claim for refund takes place when the schedule is approved by the Commissioner and not when the taxpayer is notified of that act. *Girard Trust Co.* v. *United States*, 270 U. S. 163. The effect of the decision of the court below is (1) that the clause providing for notice by mail within ninety days after the disallowance of a claim for refund is mandatory, (2) that if such notice is given within ninety days the two-year period of limitations begins to run from the date the rejection schedule is approved, and (3) that if no notice is given to the taxpayer after the approval of the rejection schedule the two-year period is never set in motion. When, if ever, an action would be barred if notice of disallowance is given after ninety days but within the two-year period was not decided. The logical implication from the decision is that there would be no bar at all. Such a result the court below characterized as unfortunate.

In reaching its conclusion the court below invoked the principle of statutory construction laid down in *French* v. *Edwards*, 13 Wall. 506, 511, and held that the provision as to notice was intended for the

protection of the taxpayer and was therefore mandatory. See also *Lyon* v. *Alley*, 130 U. S. 177; *Marx* v. *Hanthorn*, 148 U. S. 172, 180; *Erhardt* v. *Schroeder*, 155 U. S. 124. In the case last mentioned the Court, applying the same test, held that the provision of Section 2939 of the Revised Statutes requiring a collector of customs to examine and appraise not less than one package out of every ten was not mandatory but directory, saying (p. 129):

> The protection of the convenience only of a taxpayer is not of such a vital nature as to authorize a court to treat a statute primarily directed to public officers for their guidance, and the substantial protection of the government, as mandatory, and to consider official acts not in strict conformity with the statute as void. The protection must be substantial, and must be intended as a guard of rights of property. Cooley on Taxation, 215, 216.

In *Hubbert* v. *Campbellsville Lumber Co.*, 191 U. S. 70, the Court refrained from stating a general rule and said (p. 76):

> "By directory provision," says Judge Cooley, "is meant that they are to be considered as giving directions which ought to be followed, but not as so limiting the power in respect to which the directions are given that it can not effectually be exercised without observing them." Cooley's Constitutional Limitations, star page 74.
>
> "Lord Penzance, in *Howard* v. *Bodington*, L. R. 2 P. Div. 211, after commenting on the difficulty of gathering any rule from the cases,

> said: 'I believe, as far as any rule is concerned, you can not safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the act, and upon a review of the case in that aspect decide whether the matter is what is called imperative or directory.'"

Prior to the Act of March 4, 1923, the taxpayer's right to bring action to recover taxes was limited to five years after the day of payment. That Act amended the statute, giving the taxpayer the additional right to sue within two years after the disallowance of his claim for refund and providing that the Commissioner should within ninety days notify him by mail of such disallowance. In the instant cases respondents were notified that their claims would be disallowed and that the disallowances would officially appear on the next schedule to be signed by the Commissioner. They had therefore actual notice that their claims would be denied and the general object intended by the notice provision of the statute was secured. As a practical matter respondents suffered no injury by reason of the failure of the Commissioner to give them a second notice after the official disallowance.

The statute in question has not been uniformly construed by the courts. See *Mahoning Coal R. Co.* v. *United States* (N. D. Ohio), 28 F. (2d) 917; *Southwestern Oil & Gas Co.* v. *United States* (W. D. Pa.), 29 F. (2d) 404; *McKesson & Robbins, Inc.*, v.

Edwards (S. D. N. Y., decided February 5, 1930, not yet reported); *Leonard* v. *United States* (Ct. Cls., decided June 3, 1929, not yet reported).

In the *Mahoning case, supra,* the court took the same view of the question as did the court below. The cases are distinguishable, in that the taxpayers in the *Mahoning case* had no actual notice of the disallowance of their claims for refund.

In the *Southwestern Oil & Gas Co. case, supra,* it was held that the statute began to run from the date of a letter advising the taxpayer that his refund claim had been reopened and reconsidered and that the Commissioner's former ruling would be adhered to, rather than from the date of notification that the original claim for refund would be rejected. The court apparently did not consider the date of approval of the official schedule of rejection as controlling.

On appeal (34 F. (2d) 446), this point was not involved.

In the *McKesson & Robbins case, supra,* the court held that where the taxpayer was advised, as were the taxpayers in the instant cases, that his claim would be rejected and would appear on the next schedule to be approved, the statute began to run from the date the official schedule was signed, notwithstanding the fact that the Commissioner as a matter of courtesy sent the taxpayer a second letter of rejection after the official disallowance.

In the *Leonard case, supra,* it was held that a suit instituted more than five years after the date of payment of the tax was barred although a claim for

refund had been filed and had never been acted upon by the Commissioner of Internal Revenue.

CONCLUSION

In view of the importance of the question involved and the need of an authoritative decision by this Court, it is respectfully submitted that writs of certiorari should issue.

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APRIL, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930